FILED
MAY 10 1994

No. 93-1589

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SEARS ROEBUCK AND COMPANY
and STATE INDUSTRIES, INC.,
Petitioners,
v.
ANNIE HARRIS, as administratrix
of the estate of JOYCE SIMPSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF IN OPPOSITION FOR RESPONDENTS

JERE L. BEASLEY
FRANK WILSON *
J. GREG ALLEN
BEASLEY, WILSON, ALLEN,
MAIN & CROW, P.C.
218 Commerce Street
P.O. Box 4160
Montgomery, AL 36103
(205) 269-2343

TYRONE C. MEANS
H. LEWIS GILLIS
THOMAS, MEANS & GILLIS
3121 Zelda Court
P.O. Box 5058
Montgomery, AL 36103
(205) 270-1033

*Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court properly determined that petitioners had waived any constitutional challenge to the separate and unequal awards of punitive damages given to the five plaintiffs in this case, based on the fact that petitioners had proposed verdict forms inviting such awards.

2. Whether the Alabama courts properly applied the state-law standards and procedures approved by this Court as constitutionally sufficient in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), in the particular factual circumstances of this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	4
CONCLUSION	11

TABLE OF AUTHORITIES

Cases Page

Armstrong v. Roger's Outdoor Sports, Inc., 581 So. 2d 414 (Ala. 1991) 7
Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989) 2
Henry v. Mississippi, 379 U.S. 443 (1965) 5, 7
Honda Motor Co. v. Oberg, cert. granted, 114 S. Ct. 751 (1994) 10
Industrial Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812 (Ala. 1989) 2
Intercontinental Life Ins. Co. v. Lindblom, 598 So. 2d 886 (Ala.), *cert. denied*, 113 S. Ct. 200 (1992) 10
Intercontinental Life Ins. Co. v. Lindblom, 571 So. 2d 1092 (Ala. 1990), *vacated*, 499 U.S. 956 (1991), *reinstated*, 598 So. 2d 886 (Ala.), *cert. denied*, 113 S. Ct. 200 (1992) 10
Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927) 2
Michigan v. Tyler, 436 U.S. 499 (1978) 5
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 6
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) ..... *passim*
Southern Life & Health Ins. Co. v. Turner, 586 So. 2d 854 (Ala. 1991) 10
TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) 4, 5, 10

Other Authorities

36 C.J.S. *Federal Courts* (1960) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1589

SEARS ROEBUCK AND COMPANY
and STATE INDUSTRIES, INC.,
Petitioners,

v.

ANNIE HARRIS, as administratrix
of the estate of JOYCE SIMPSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

---

BRIEF IN OPPOSITION FOR RESPONDENTS

STATEMENT

In this products liability action filed in Alabama state court, the five respondents sought damages for injuries and one death resulting from a discharge of carbon monoxide from a gas water heater in a mobile home. It was undisputed that the water heater was improperly installed, in that it lacked a vent pipe and was connected to a source of liquid propane rather than natural gas. The jury, however, ultimately concluded that the accident was also caused by petitioners' negligent or wanton conduct in producing an unreasonably dangerous product. Specifically, respondents' evidence at trial showed that industry standards required that "an installation and instruction manual be permanently attached to the water heater," Pet. App. 71a, rather than placed in a pouch

taped to the water heater that could, as here, be lost. The evidence also showed that carbon monoxide sensors or shut-off devices were commercially available but were not included with this water heater, and that the labelling on the water heater failed to instruct users to vent it and to connect it only to natural gas.

The jury awarded $4 million to the estate of the decedent on the wrongful death claim, $3 million ($2 million in compensatory damages and $1 million in punitive damages) to each of two other plaintiffs, and $1 million ($750,000 in compensatory damages and $250,000 in punitive damages) to each of the final two plaintiffs. These verdicts were upheld by the trial court in an opinion that carefully analyzed the evidence establishing liability as well as the relevant factors justifying the award of punitive damages. Pet. App. 47a-64a.

On appeal, the Alabama Supreme Court agreed that the evidence supported petitioners' liability, but ordered remittiturs with respect to the compensatory damages awarded to the four living plaintiffs, reducing those damages from $5.5 million to $850,000. The court went on to review the $2.5 million in punitive damages awarded to the four living plaintiffs, as well as the $4 million awarded on the wrongful death claim.[1] The court did not order a remittitur with respect to punitive damages.

In the portion of its opinion determining that the punitive damages were not excessive, the Alabama Supreme Court applied the state-law standards approved by this Court as constitutionally sufficient in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Pet. App. 96a (discussing *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989)). After "thoroughly reviewing the evidence

---

[1] Under Alabama law, there is no compensatory relief in wrongful death cases; the sole relief is in the form of punitive damages. *See Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927); *Industrial Chem. & Fiberglass Corp. v. Chandler*, 547 So. 2d 812 (Ala. 1989).

in this case," the court concluded that $6.5 million in punitive damages did not exceed "the amount necessary to accomplish society's goals of punishment and deterrence." Pet. App. 96a. It reasoned that petitioners had specifically designed their water heater to allow users to install it and had thereby incurred a "legal duty to anticipate reasonably foreseeable ways in which consumers would misinstall their product and injure themselves and to change its design to eliminate the risks associated with such misuses or to adequately warn consumers of those risks." *Ibid.* It noted the proof that petitioners were aware that consumers were injuring and killing themselves by misinstalling their gas water heaters but "did nothing to alter the design or labelling of their product." Taking into account the "reprehensibility of [petitioners'] wanton conduct and the extreme risk of injury or death that conduct created," *ibid.*, as well as the magnitude of punitive awards in other comparable cases, *id.* at 96a-97a, the court saw no reason to conclude that the damages here were excessive.

In their appeal, in addition to arguing excessiveness under state law, petitioners had raised two federal constitutional challenges to the punitive damage awards. They contended that these awards violated the Due Process Clause because (1) they imposed multiple penalties for a single tort, and (2) those penalties were disparate in amount. Pet. App. 92a, 113a. The Alabama Supreme Court, however, refused to reach the merits of these contentions. It did so because it found that petitioners had "requested special verdict forms, materially similar to the ones eventually submitted to the jury, asking the jury to return separate awards of punitive damages for each plaintiff." Pet. App. 92a-93a. It concluded that such jury forms "invited" the jury to return multiple and different awards of punitive damages, and held that petitioners "cannot now on appeal base an argument for reversal on alleged error that they themselves invited." Pet. App. 93a (citing cases).

Petitioners sought rehearing, arguing *inter alia* that the affirmance of widely disparate punitive damage awards could not be squared with the requirements of *Haslip*. Pet. App. 41a-46a. The Alabama Supreme Court made an unrelated modification in its opinion, but otherwise denied rehearing.

ARGUMENT

Although petitioners have asked the Court to review a single "question presented," that question combines two quite distinct constitutional claims. When these two claims are identified and separately analyzed, it becomes clear that neither warrants review in this Court. First, to the extent that petitioners are complaining about the fact that the jury awarded separate and different amounts of punitive damages to the five plaintiffs, that claim is not available for review because it was properly treated as waived in the Alabama Supreme Court. In any event, there is no reason to conclude that the claim raises a substantial constitutional issue—much less an issue of general concern outside this fact-specific context. Petitioners also seem to complain about the Alabama Supreme Court's affirmance of a total punitive award of $6.5 million, suggesting that the approval of this total award is representative of the Alabama Supreme Court's alleged mishandling of punitive damages cases since *Haslip*. But they offer little or nothing to support the notion that $6.5 million was constitutionally excessive in this case. Nor have they established the existence of some more general problem in Alabama's post-*Haslip* case law —let alone explained how a Supreme Court ruling in this case would add anything to what the Court has already decided in *Haslip* and *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993).

1. As noted above, petitioners in the Supreme Court of Alabama drew a clear distinction between their arguments focusing on the jury's multiple and diverse punitive awards and their general attack on the total punitive

damages as excessive. The former arguments were presented in the constitutional section of petitioners' principal brief, which asserted that petitioners had been denied due process because they had been subjected to "repeated" punishments for the same tort and had not received clear notice about the amount of punishment that the jury deemed appropriate for that tort. Pet. App. 113a-17a.[2] The Alabama Supreme Court, in turn, addressed these two specific arguments in the "due process" section of its opinion,[3] holding that they had been waived because petitioners had "invited" any error by proposing verdict forms that asked the jury to return separate awards of punitive damages for each plaintiff. Pet. App. 92a-93a.

This ruling of the Alabama Supreme Court plainly constitutes an independent and adequate state ground for affirmance with respect to any constitutional argument that the jury should have been required to return only one award of punitive damages (or five identical awards) in this case brought by five separate plaintiffs. *See Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978) ("Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule."); *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). *See also TXO Prod. Corp.*, 113 S. Ct. at 2723-

[2] Petitioners made it clear that they considered these arguments to be distinct from the usual constitutional excessiveness claim, asserting that they were presenting "constitutional challenges never previously addressed in Alabama." Pet. App. 113a.

[3] Pet. App. 92a ("The two issues they raise are (1) whether the trial court's judgment violates the due process rights of the defendants on the basis that it does not apprise them of the extent of the punishment imposed for their conduct, and (2) whether the trial court's judgment violates the due process rights of the defendants by meting out multiple and differing punishments for a single wrongful act.").

24 (plurality opinion of Stevens, J.). Petitioners in this Court do not dispute the *factual* basis of the court's ruling—*i.e.*, the assertion that they proposed verdict forms "materially similar" to the ones used in the trial court.[4] Moreover, the Alabama Supreme Court was certainly correct in determining that such verdict forms, with separate blank spaces for punitive damages that could be awarded to each of five plaintiffs, constituted an "invitation" to award such damages five times and in varying amounts. After all, the forms only make sense if the jury was left with the discretion to award punitive damages to more than one plaintiff and to vary the amounts. Indeed, petitioners themselves argued in their post-trial motion that the "procedures" used had "encourage[d]" the imposition of multiple and varying penalties. Pet. App. 109a.[5]

Nor is there any indication that application of the "invited error" doctrine in this case was some sort of subterfuge to avoid reaching a federal claim. Petitioners suggest that the doctrine constitutes a " 'novelty in procedural requirements' " designed to " 'thwart review in this Court.' " Pet. 10 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958)). But the reality is that the "invited error" rule has been applied in the Ala-

---

[4] In their rehearing petition in the Alabama Supreme Court, petitioners denied that they had proposed such verdict forms. Pet. App. 39a-41a. Petitioners have now abandoned this basis for attacking the ruling of the Alabama Supreme Court, apparently recognizing that this factual issue would never warrant Supreme Court review and/or that it is irrelevant because it is *undisputed* that petitioners never objected to the verdict forms actually used.

[5] It is no answer for petitioners to assert that they raised other, more general constitutional issues in the trial court and raised these specific concerns on appeal. *See* Pet. 7-8. Under the applicable state procedural rule, they waived this claim when they proposed the verdict forms and allowed the jury to decide the case using "materially similar" forms. Indeed, even if they had not proposed comparable forms, their failure to object to the forms actually given to the jury would have been sufficient to waive any later attack on the jury's decision to return multiple, disparate punitive verdicts.

bama Supreme Court (and presumably every other court in this country) for many years.[6] Petitioners also suggest that the application of the doctrine in the court below constituted "discrimination" against federal claims because, in one previous case, the court reached a state constitutional issue that the parties had not brought up. Pet. 9-10 (citing *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991)). But *Armstrong* did not involve "invited error" at all. Moreover, the state constitutional issue that the court chose to reach was a separation-of-powers question that had to be resolved on appeal, even if not raised by the parties, since it affected the court's own decisionmaking process in that case. *See id.* at 416. Nothing of the sort is present here. In any event, one case can hardly establish a pattern of discrimination against federal claims.

In sum, to the extent that plaintiffs' claims are based on the fact that the jury divided the punitive damages into five unequal amounts, that issue was not addressed on the merits by the Alabama Supreme Court, and its reasons for not doing so were entirely proper. There is no reason for this Court to consider addressing the issue.

2. Even if there were no waiver problem, there still would be no reason for this Court to review the question whether the jury was properly allowed to return varying punitive damages awards for each of the five plaintiffs. To begin with, petitioners have made no showing that this particular question is one that arises frequently or has created confusion in the lower courts. Indeed, they cite not a single case dealing with awards to multiple plaintiffs.

---

[6] *See* Pet. App. 93a (citing Alabama cases); *Henry v. Mississippi*, 379 U.S. at 451 ("[B]y delaying objection to the evidence, the defense might have hoped to invite error and lay the foundation for a subsequent reversal."); 36 C.J.S. *Federal Courts* § 201(13)(h) (1960) ("A party on appeal will not be permitted to take advantage of errors which he himself invited or induced the trial court to commit . . . .") (citing cases).

On the merits, moreover, there is little reason for concern about the constitutionality of the jury's verdicts. Petitioners act, first of all, as if it were obvious that these verdicts constituted separate and redundant penalties. But since they were returned simultaneously by a single jury, there is every reason to conclude that the jury viewed the matter globally, determining that—given the nature of the conduct and the harm that it threatened (and, in fact, caused)—a total award of $6.5 million in punitive damages was appropriate in this case. If the five plaintiffs had proceeded in separate courts, it is perhaps conceivable that petitioners might have been faced with redundant punishments. The fact that the suits were tried simultaneously before a single jury, far from creating unconstitutional duplication, significantly enhanced petitioners' chances of avoiding that result.

Petitioners also assert that it was irrational for the jury to punish them in different amounts for the same act. But what the jury actually did was to allocate the $6.5 million to reflect the extent of the injury incurred by each plaintiff—awarding $4 million to the estate of the decedent, $1 million to each of two other plaintiffs who received higher compensatory damages, and $250,000 to the final two plaintiffs who received the smallest compensatory awards.[7] Petitioners themselves expressly advocate a linkage between punitive damages and the "harm" done to the plaintiff. Pet. 15. Having done so, they can hardly claim that it violated the Constitution for the jury to adopt precisely the same approach.

3. Petitioners also contend that the total amount of punitive damages in this case is excessive and was not properly reviewed by the Alabama Supreme Court. It is at least debatable whether this constitutional issue was

---

[7] Allocation of the bulk of the punitive damages to the wrongful death claim was especially appropriate since, in Alabama, this is the *only* type of damages available in a wrongful death case. *See* note 1 *supra*.

properly preserved in the courts below.[8] In any event, it hardly provides a convincing basis for a grant of review. Petitioners are making essentially the same argument that is made by defendants in every punitive damages case—that a given award is too large, taking into account the nature of the tort, the extent of the injury, the financial impact on the defendants, and other factors. But beyond making that bald assertion, they offer little in the way of reasons why Supreme Court review of that issue in this case is warranted.

The problem, from petitioners' point of view, is that this Court has already affirmed the constitutionality of the Alabama *system* for awarding and reviewing punitive damages, in *Haslip*. As a result, petitioners are left with an argument that the Court should review the *application* of the Alabama standards and procedures in this case. Petitioners then attempt to transform that fact-specific question into a matter of general import by asserting that this case is typical of a supposed pattern of abuse by the Alabama Supreme Court.

But this effort is unavailing. To begin with, petitioners have presented *no* evidence that the Alabama system for reviewing punitive damage awards is malfunctioning. They include a long list of substantial jury *verdicts* (most of which were not appealed, have appeals pending, or were reduced in post-trial settlements), but that hardly shows a problem with the *review* system. Petitioners go

---

[8] In their appeal to the Alabama Supreme Court, petitioners argued the overall excessiveness issue only as a matter of state law, in a section of their brief separate from the due process section. *See* p. 3 *supra*; Pet. App. 113a-24a; Appellants' Brief in the Ala. Sup. Ct. at 149-63. The Alabama Supreme Court discussed the issue only with reference to state law. Pet. App. 95a-97a. On rehearing, petitioners' constitutional arguments again focused entirely on the fact that the Alabama Supreme Court had affirmed five different awards of punitive damages arising from a single tort. Pet. App. 41a-46a. The rehearing petition did not appear to argue that a total award of $6.5 million was constitutionally excessive.

on to say that it is "rare," Pet. 16, for the Alabama Supreme Court to reduce a punitive damage award, describing the " 'presumption of correctness' accorded to jury verdicts" as "virtually unrebuttable" once a case reaches that court, Pet. 14-15. In fact, however, by our count, they cite only seven post-*Haslip* cases in which the Alabama Supreme Court affirmed previously unreduced jury awards of punitive damages, Pet. 13 n.8, 14 & n.10, 15 n.11, while citing four cases where the court ordered substantial remittiturs, Pet. 16 n.13.[9] As in any other legal context, the fact that a majority of appeals lead to affirmances is neither surprising nor an indication that the appellate process is no longer "meaningful," Pet. 11.

Perhaps most importantly, petitioners fail to suggest any reason why review by this Court in this case would itself be "meaningful." This Court has already analyzed more than once the extent to which the Due Process Clause imposes an outer limit on the magnitude of the punitive damages that may be awarded in a given case. *See TXO Prod. Corp.*, 113 S. Ct. at 2718-23 (plurality opinion); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 1038-39. *See also Honda Motor Co. v. Oberg*,

---

[9] In two other cases cited by petitioners, *Southern Life & Health Ins. Co. v. Turner*, 586 So. 2d 854, 858 (Ala. 1991), and *Intercontinental Life Ins. Co. v. Lindblom*, 598 So. 2d 886 (Ala.), *cert. denied*, 113 S. Ct. 200 (1992), *see* Pet. 15, the Alabama Supreme Court did reinstate punitive damage awards after its original decisions had been remanded for reconsideration in light of *Haslip*. In *Southern Life*, however, the trial court had already reduced a jury award of $5 million in punitive damages to $500,000. *See* 586 So. 2d at 856. And in *Intercontinental Life*, the Alabama Supreme Court had itself already reduced the punitive damages from over $3 million to $1 million. *See Intercontinental Life Ins. Co. v. Lindblom*, 571 So. 2d 1092, 1100 (Ala. 1990), *vacated*, 499 U.S. 956 (1991), *reinstated*, 598 So. 2d 886 (Ala.), *cert. denied*, 113 S. Ct. 200 (1992). Petitioners also cite three cases in which the sole issue was whether relatively modest awards of punitive damages were barred because the jury had failed to award compensatory relief. Pet. 15 & n.12. These cases are largely irrelevant here.

cert. granted, 114 S. Ct. 751 (1994).[10] Petitioners have suggested no new review procedure that they believe to be constitutionally mandated. Nor have they offered some new standard for determining whether a given punitive award—like the $6.5 million awarded in this case—crosses the constitutional line.[11] As a result, there is little reason to think that a grant of review in this case would lead to anything more than an application of accepted principles to an unremarkable, and very specific, set of factual circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JERE L. BEASLEY
FRANK WILSON *
J. GREG ALLEN
BEASLEY, WILSON, ALLEN, MAIN & CROW, P.C.
218 Commerce Street
P.O. Box 4160
Montgomery, AL 36103
(205) 269-2343

TYRONE C. MEANS
H. LEWIS GILLIS
THOMAS, MEANS & GILLIS
3121 Zelda Court
P.O. Box 5058
Montgomery, AL 36103
(205) 270-1033

*Counsel of Record

[10] Because this Court approved the Alabama review system in *Haslip*, and the *Honda Motor Co.* case deals with the constitutionality of a system that provides *less* appellate review of punitive damage awards, there would appear to be no reason to hold this case pending the outcome of *Honda Motor Co.*

[11] Such a determination would be particularly problematic here where $4 million of the $6.5 million constituted the sole relief provided on the wrongful death claim. *See* note 1 *supra*.